KASIRAJAN NADARAJAN

v.

MAJISTRET, MAHKAMAH MAJISTRET ALOR SETAR, KEDAH & ORS

HIGH COURT MALAYA, ALOR SETAR
MOHD SOFIAN ABD RAZAK JC
[CRIMINAL TRIAL NO: 44-12-2006]
11 MARCH 2007

PREVENTIVE DETENTION: *Detention order - Drug dependant - Habeas corpus - Whether detention order valid - 'Cannabinol' - Whether part of plant material cannabis - Certification by medical officer - Whether defective - Irregularities as to arrest procedure prior to detention order - Whether irrelevant to legality of detention - Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 3(1), 4(1)(b), 6(1) - Dangerous Drugs Act 1952, First Schedule*

In this application for a writ of *habeas corpus*, the primary issue that arose was whether the detention order as issued by the learned Magistrate against the applicant pursuant to s. 6(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act') was irregular, and null and void. The applicant alleged that the detention order was bad in law as there was no clear description of the type of drug he was alleged to have been dependant on. It was further alleged that the medical report as submitted by the Medical Officer ('Dr. Siti Zubaidah') vide the "Borang Perakuan Tentang Penagihan Dadah" ('Borang 2'), was so flawed that it was rendered invalid for the purpose of s. 6(1) of the Act. It was not in dispute that, in the said Borang 2, the drug in question was described as "11-Nor-Delta-9, Tetra-Hydrocannabinol-9-Carboxylic Acid" – thereby evoking the objection that the drug was not 'cannabis' as described in the First Schedule of the Dangerous Drugs Act 1952 ('the DDA'). The facts further showed that Borang 2 had also required a deletion to be made of a certain phrase therein for the purpose of determining whether Dr. Siti Zubaidah was a Government Medical Officer or a registered Medical Practitioner at the material time, but that no such deletion was made – thereby prompting the contention that Borang 2 was, upon the authority of *Quan Kim Hock v. Timbalan Menteri Dalam Negeri*, invalid. These arguments notwithstanding,

A the respondents retorted that the irregularities were of no consequence to the validity of the detention order. According to the learned Federal Counsel, the court ought to take judicial notice that the description 'cannabinol' is cannabis as described under the First Schedule of the DDA. According to the Federal Counsel
B further, even without the deletion, there was no ambiguity as to the capacity or qualification of Dr. Siti Zubaidah when certifying Borang 2.

Held (dismissing application):

C
(1) There was no ambiguity as to the description of the drug upon which the applicant was certified to be dependent. As was the case in *Abdul Moathi bin Othman v. Kementerian Dalam Negeri & Ors*, the court takes judicial notice that
D 'cannabinol' is part of the plant material cannabis. (paras 11 & 12)

(2) The purpose of detaining a suspect under s. 3 of the Act and bringing him before a magistrate under s. 4(1)(b) is to enable the suspect to be further detained to undergo tests
E to determine whether he is a drug dependant within the meaning of the Act. This is what happened in this case. The applicant was brought before the Magistrate in chambers, whereof a remand order was issued by the learned Magistrate pursuant to ss. 3(1) and 4(1)(b) read together.
F (paras 23 & 24)

(3) Dr. Siti Zubaidah had explained as to how Borang 2 came into being. She had signed Borang 2 and had confirmed that the applicant was a drug addict based on her independent
G finding. On the evidence, the court is satisfied that the tests were conducted by her and assisted by her assistant. (para 26)

(3a) With respect, this court does not share the same view as the learned judge in *Quan Kim Hock* that failure to delete the
H words indicating in what capacity the Medical Officer had certified Borang 2 is fatal. The official chop used clearly indicated that Dr. Siti Zubaidah binti Ismail was at the material time a Government Medical Officer attached to the
I Klinik Psikiatri & Kesihatan Mental Hospital Alor Setar. There is no ambiguity as to her capacity or qualification when certifying Borang 2, and consequently there is no necessity for the deletion to be made in Borang 2. It ought

also to be noted that, in *Quah Kim Hock*, Borang 2 was also rejected because the Medical Officer had failed to name the drug through the use of which the applicant therein became a drug dependant. It was not the case here. (paras 32 & 33)

(4) The alleged irregularities in the detention of the applicant as might have occurred prior to the detention order of the learned Magistrate were, on the authority of *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri,* irrelevant in the consideration of the legality of the detention order. (paras 42, 43 & 47)

(5) An order of detention made by a Magistrate under s. 6(1) of the Act must comply with three requirements, namely it must be made: (i) pursuant to certification by the Medical Officer that the subject is a drug dependant; (ii) upon the recommendation of the Rehabilitation Officer; and (iii) after an opportunity had been given to the subject to make representation. The learned Magistrate here had complied with all the requirements. Consequently the order of detention is regular. (paras 48 & 51)

Case(s) referred to:

Abdul Moathi Othman v. Kementerian Dalam Negeri & Others (Criminal Application No: 44-11-2001) ***(refd)***

Majistret, Mahkamah Majistret Rawang & Anor v. Gurdeep Singh Atma Singh [2000] 2 CLJ 433 HC ***(refd)***

Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri [2005] 4 CLJ 613 SC ***(foll)***

Muhammad Jailani Kassim v. Timbalan Menteri Dalam Negeri [2006] 4 CLJ 687 FC ***(dist)***

Quan Kim Hock v. Timbalan Menteri Dalam Negeri [1999] 7 CLJ 585 HC ***(not foll)***

Sathiyamurthi v. Penguasa/Komandan Pemulihan Karangan, Kedah [2006] 4 CLJ 862 FC ***(refd)***

Timbalan Menteri Dalam Negeri & Others v. Arasa Kumaran [2006] 4 CLJ 847 FC ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 39B, First Schedule Part 1 & Part 2

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 5(1), 6(1)

Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 3(1), 4(1)(b), 6(1)(a)

Other source(s) referred to:
Teo Say Eng, *A Practical Handbook On Criminal Prosecution*, 2nd edn, pp 102, 103 & 104

For the applicant - R Dev Chander; M/s R Dev Chander & Co
For the respondents - Nahra Dollah; DPP

Reported by WA Sharif

JUDGMENT

Mohd Sofian Abd Razak JC:

[1] The applicant Kasirajan a/l Nadarajan had been ordered by the Magistrate, Alor Setar on 6 July 2006 to be detained and to undergo drug rehabilitation treatment at the Pusat Serenti Sungai Petani for a period of two (2) years under s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983. This was the applicant's application for a writ of *habeas corpus*.

[2] At the outset of the hearing, counsel for the applicant informed the court that he wishes to raise a preliminary issue on the description of the drug as found in 2 exhibits namely in 'KN4' and 'KN5' and for the court to make a ruling before proceeding with other issues.

[3] Exhibit 'KN4' is the Borang 2, which is the 'Perakuan Tentang Penagihan Dadah' addressed to the Magistrate, Magistrate's Court by the Medical Officer dated 5 July 2006 whereby the said Medical Officer had carried out the test on the applicant and certified that the applicant is a drug dependant pursuant to the Act and also stating the type of drug on which the applicant is dependant on.

[4] Exhibit 'KN5' is the 'Borang Permintaan Ujian Pengesahan Dadah Dalam Air Kencing' which is a request by the police to the Hospital Alor Setar to conduct urine test on the applicant's urine dated 20 June 2006.

[5] In both the exhibits namely, 'KN4' and 'KN5', the drug description is 11-Nor-Delta-9, Tetra-Hydrocannabinol-9-Carboxylic Acid (Kaedah Thin Layer Chromatography).

[6] The learned counsel for the applicant submitted that it does not come within the description in either First Schedule Part 1 & Part 2 of the Dangerous Drugs Act 1952. But nevertheless it is listed in Part 3 of the said Schedule.

[7] The learned counsel for the applicant submitted that there was a doubt as to whether the description therein could be described as cannabis and as such the benefit of the doubt should be in favour of the applicant.

[8] Reference was made by the learned counsel for the applicant to the case of *Majistret, Mahkamah Majistret Rawang & Anor v. Gurdeep Singh Atma Singh* [2000] 2 CLJ 433. The issue there was the alleged serious discrepancy between the certification of the Medical Officer and the report of the Rehabilitation Officer, in that the former had confirmed that the detenu was hooked to morphine whilst the latter stated he was dependant on heroin. The learned judge was correct when he remarked that 'on this ground alone *habeas corpus* ought to issue. The discrepancy between the certificate of the Medical Officer and the report of the Rehabilitation Officer gave rise to doubt not only as to the nature of the drug the detenu had become dependant on but also to the wider question of whether he was a drug dependant to justify the making of the order under s. 6(1) of the Act. It was a fundamental discrepancy, having struck at the very objective of treating and rehabilitating drug dependants. It was serious enough as to affect the integrity of the Rehabilitation Officer, and that being so, the order made by the magistrate was absolutely unsustainable.'

[9] On this issue the learned Federal Counsel submitted that the report of the Rehabilitation Officer dated 5 July 2006 clearly stated as follows: 'menagih dadah jenis ganja' and the certificate of the Medical Officer dated 5 July 2006 which certified that the applicant is a drug dependant pursuant to the Act, and also stating the type of drug on which the applicant is dependant on namely 11-11-Nor-Delta-9, Tetra-Hydrocannabinol-9-Carboxylic Acid (Kaedah Thin Layer Chromatography).

[10] The court is of the view that as far as the description of the drug upon which the applicant was certified as a drug dependant, there is no ambiguity at all.

[11] The learned Federal Counsel for the respondents further submitted that the said description as found in 'KN4' and 'KN5' is cannabis and referred to the unreported case of *Abdul Moathi bin Othman v. Kementerian Dalam Negeri & Others* (Criminal Application No: 44-11-2001) at the Penang High Court, a case on which the court was urged to take judicial notice that cannabinol is part of the plant material cannabis under Schedule 1, Dangerous Drugs Act 1952. The learned Federal Counsel for the respondent urged the court to take judicial notice that the said description is cannabis as described under Schedule 1, Dangerous Drugs Act 1952.

[12] The court after perusing the said authority agreed and take judicial notice that 'cannabinol' is part of the plant material cannabis and also that the court had frequently heard evidence from the chemist given during the trial for trafficking cannabis under s. 39B Dangerous Drugs Act 1952.

[13] It is pertinent to note that after the court had made its finding on the fact that the description as found in 'KN4' and 'KN5' is cannabis, the counsel for the applicant had written to court *vide* letter dated 12 December 2006 inviting to court to reconsider its decision with regard to its finding that 'cannabinol' is part of the plant material cannabis.

[14] The learned counsel for the applicant enclosed photocopies from the book *'A Practical Handbook On Criminal Prosecution'* in the Subordinate Courts by Teo Say Eng 2nd edn at pp. 102, 103 & 104 in particular as to chemist analysis.

[15] On this issue the court is of the view that it has no power to review its finding made earlier as it was already *'functus officio.'*

[16] Be that as it may, the court has had the opportunity and benefit of reading the said pages referred to by the learned counsel for the applicant and is of the view that the answer to Q4 A(4) describes the TLC is used to confirm the presence of cannabinoids on the plant materials. The cannabinoids are the active abstinent of the cannabis resin. TLC is a process by which the component of a mixture are separated on the solid phase or stationary phase under the influence of a mobile phase. In the mobile phase is a liquid. The TLC will separate the component, in the plant extract and by comparing with standard cannabinoids such as tetrahydrocannabinol, cannabidiol and cannabinol, the presence of cannabinoid is thus confirmed.

At p. 104

B

Q2: What are the tests used by the chemist in the analysis of heroin, morphine or monoacetyl morphine.

(1) The colour test

(2) TLC – is a qualitative test. This test is used to confirm the nature of the drug under analysis, whether it contains heroin, morphine and/or monoacetyl morphine.

[17] In exh. 'KN5' – jenis ujian dadah yang diminta – morphine and cannabis.

[18] The chemist in this case had used the TLC test on the urine sample of the applicant and the result shows that it contains cannabinol and not morphine.

[19] The court is of the view that there is no doubt as to the finding made by the chemist as to what drug was shown by the TLC test.

2nd Issue

[20] The second issue raised by the learned counsel for the applicant is the fact that no report was made by the officer to the learned Magistrate to enable the learned Magistrate to issue an order that the applicant be detained to undergo tests for the purpose of determining whether he is a drug dependant within the Act. Reference was made by the learned counsel to Borang I of the Schedule.

[21] The court is of the view that the purpose of Borang I must be read together with the provisions of s. 4(1)(b) of the Act and to make it even clearer s. 4(1)(b) should be read together with s. 3(1) which provides for the power to detain those who are suspected of being drug addict.

[22] Section 4 in general provides the power to detain exceeding 24 hrs those who are reasonably suspected of being drug addicts to ascertain whether they are drug dependants where such ascertainment could not be obtained within 24 hrs.

[23] The purpose of detaining the suspect under s. 3 to be brought before the learned Magistrate under s. 4(1)(b) is to enable the suspect to be further detained to undergo tests whether he or she is a drug dependant within the meaning of the Act.

[24] The court is of the view that in this case when the applicant was brought before the learned Magistrate in Chambers, the learned Magistrate issued the remand order pursuant to s. 3(1) and 4(1)(b) to be read together ie, on being informed by the officer that the test could not be completed within 24 hrs of his arrest.

3rd Issue

[25] The counsel for the applicant also disputed the Borang 2 – exh. 'KN4' – alleging the following:

i) the difference in the hand writing particularly the name of the doctor which is not the same as the other hand writing in Borang 2. Exhibit 'KN4' and also no deletion was made whether Dr. Siti Zubaidah binti Ismail was at all material time a Government Medical Officer or a registered Medical Practitioner.

[26] Dr. Siti Zubaidah binti Ismail in her affidavit affirmed on 11 November 2006 affirmed that at para 8 explained as to how 'KN4' come into being – The court is satisfied that the tests were conducted by her and assisted by her assistant. Furthermore, she had signed 'KN4' to confirm the finding.

[27] At para 5 and 9 of the said affidavit, wherein she had stated that the applicant was a drug dependant based on an independent finding and not influenced by the finding of Jabatan Patologi Hospital Alor Star.

[28] She also confirmed that the 'pemeriksaan, pemerhatian dan ujian-ujian yang perlu yang telah saya jalankan sendiri sepertimana di dalam para 5 di atas.'

[29] On the issue raised by the learned counsel for the applicant that no deletion was made to the words whether she was at all material time a government Medical Officer or a Medical Practitioner, in exh. 'KN4' is fatal to the prosecution. The learned counsel for the applicant relied on the case of *Quan Kim Hock v. Timbalan Menteri Dalam Negeri* [1999] 7 CLJ 585.

[30] The facts of the said case is identical with the facts of the case before the court. In the said case, the issue of non-compliance with Borang 2, was also raised by the learned counsel for the applicant. The doctor who signed the certificate did not indicate clearly in it whether he was certifying it in his capacity as a government Medical Officer or a registered Medical Practitioner.

[31] The learned judge in *Quan Kim Hock*'s case *(supra)* was of the view that the failure by the Medical Officer to delete the words attributing to him is fatal and therefore Borang 2 above could not be accepted as a valid medical certificate for the purpose of s. 6(1) of the Act.

[32] With respect I do not share the same views as expressed by the learned judge in *Quan Kim Hock*'s case *(supra)* that failure to delete the words indicating in what capacity the medical officer had certified Borang 2 exh. 'KN4' is fatal. I agreed with the learned Federal Counsel for the respondent that official chop clearly indicated that Dr. Siti Zubaidah binti Ismail was at the material time a Government Medical Officer attached to the 'Klinik Psikiatri & Kesihatan Mental Hospital Alor Setar' which is a government medical institution as opposed to private medical institution. There is no ambiguity as to the capacity or qualification of Dr. Siti Zubaidah binti Ismail when certifying Borang 2 exh. 'KN4.' There is no necessity for the deletion to be made in Borang 2, exh. 'KN4' any more. To suggest that others might have misused the rubber stamp is too remote.

[33] The learned judge in *Quan Kim Hock*'s case *(supra)* also rejected the Borang 2 because the Medical Officer had failed to name the drug or drugs, through the use of which the applicant become a drug dependant. In this case, before the court, this was not the situation, the government Medical Officer had indicated that the drugs on which the applicant had become drug dependant is '11-Nor-Delta-9-Tetra Hydrocannabinol-9-Carboxylic Acid (Kaedah Thin Layer Chromatography).

[34] There is also no issue here as to whether Dr. Siti Zubaidah binti Ismail is a qualified person as prescribed under the Act. Unlike in the case of *Muhammad Jailani Kassim v. Timbalan Menteri Dalam Negeri* [2006] 5 AMR, wherein the facts are different but the qualification of the officer was an issue. In the

A said case the police officer was not a legally qualified person pursuant to s. 5(1) Dangerous Drug (Special Preventive Measures) Act 1985 (697).

[35] The learned counsel for the applicant also takes issue of the B fact that the Rehabilitation Officer had included issues which are prejudicial to the applicant when the learned Magistrate considers the applicant as to what was the appropriate order to be made under s. 6(1) of the Act.

C **[36]** Under the law as it stood, the previous history of a person will be contained in a report of the Rehabilitation Officer which the Magistrate must consider before making the appropriate order.

[37] There is also the issue of illegality before the order was made by the learned Magistrate under s. 6(1) of the Act.

D

[38] The alleged irregularities prior to the detention order made by the learned Magistrate on 6 July 2006 *inter alia* includes the fact the applicant was arrested on 19 June 2006 by the police, handcuffed. During the arrest no reasons were given and the E applicant later brought before the learned Magistrate and ordered to be remanded for purposes of ascertaining whether he was a drug dependant pursuant to the Act. The irregularities stated therein contravened the Federal Constitution with regards the applicant's rights therein.

F **[39]** The stance taken by the counsel for the applicant is that if the court makes a finding that there are irregularities prior to the order under s. 6(1) of Act, then the said order is null and void.

[40] On this issue the learned Federal Counsel for the respondent G referred to the Supreme Court case of *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri* [2005] 4 CLJ 613.

[41] The facts of this case are different from the facts of the case before the court. Here it relates to 2 issues, one was the H detention of the applicant by the police on 15 April 2004. Secondly, it relates to the detention by the Minister under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. The applicant alleged that there are irregularities in his arrest and detention under s. 3(2) which had vitiated the order of detention I issued by the Minister under s. 6(1).

[42] In dismissing the appeal, the court held *inter alia* the prior irregularities in the detention of the appellant under s. 3(2) were not relevant to consider the legality of the detention order made under s. 6(1). The detention order made against the appellant under s. 6(1) was regular.

[43] Adopting this principle the learned Federal Counsel for the respondents submitted that if there were irregularities prior to the learned Magistrate making the order on 6 July 2006 they are irrelevant.

[44] Learned counsel for the applicant nevertheless invited the court not to follow the decision in *Mohd Faizal Haris*'s case because the facts are different – In *Mohd Faizal Haris*'s case – it concerns the detention order made by the Minister whereas here the detention order was made by the learned Magistrate.

[45] The court is also appraised of the case of *Timbalan Menteri Dalam Negeri & Others v. Arasa Kumaran* [2006] 4 CLJ 847 – where the Federal Court disagreed with the learned High Court judge on the issue that His Lordship was not bound by *Mohd Faizal Haris*'s case on the ground that *Mohd Faizal Haris*'s case was under the 1985 Act whereas the motion before the learned High Court judge was under the 1969 Ordinance and therefore inapplicable.

[46] In arriving at his conclusion, the learned judge only dealt with the differences between both the laws. The Federal Court held that the learned High Court judge is bound by the judgment of this court in *Mohd Faizal Haris*'s case and ought to have exercised more caution and restraint in distinguishing it.

[47] Based on the doctrine of *stare decisis*, I cannot disregard the decision of *Mohd Faizal Haris*'s case but to observe and follow the *ratio decidendi* therein.

[48] In this regard, in the final analysis, the court is of the view that an order made by the Magistrate under s. 6(1) of the Act, must comply with the following requirements:

1) Certification by a medical officer that the subject is a drug dependent.

A 2) the recommendation of the Rehabilitation Officer and

3) the giving of an opportunity to the subject to make representation.

B **[49]** All these 3 requirements relate to the condition of a person as a drug dependant and are prerequisites to the exercise of power by a Magistrate. They are therefore mandatory and the test to be adopted is an objective test. This can be seen from the wordings and s. 6(1) of the Act, "... shall upon the recommendation of a Rehabilitation Officer ... order such person to undergo treatment C at a Rehabilitation Centre ..., or order such person to undergo supervision." It is therefore mandatory for the Magistrate to make an order either under s. 6(1)(a) or (b) of the Act upon the recommendation of the Rehabilitation Officer.

D **[50]** The learned Magistrate in case before the court, had acted upon the recommendation by the Rehabilitation Officer by ordering that the applicant to undergo treatment at Pusat Serenti Sungai Petani, Kedah for a period of two (2) years and thereafter be placed under the supervision of Probation Officer pursuant to E s. 6(1)(a) and subsection 6(2) of the Act. (See the case of *Sathiyamurthi v. Penguasa/Komandan Pemulihan Karangan, Kedah* [2006] 4 CLJ 862.

[51] The court is of the view that the 3 requirements stated F above had been complied before the Magistrate made the order on 6 July 2006. The detention order made against the applicant under s. 6(1)(a) of the Act is regular and therefore, I dismissed the application for a writ of *habeas corpus*.

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